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Australia: coal and wind interests power ISDS threats[1]

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Most arbitration practitioners have heard of the investor-state arbitration claim brought by Philip Morris Asia Limited against the Commonwealth of Australia, which was dismissed on jurisdictional grounds in December 2015. In the meantime, other parties have been making noise about bringing investor-state claims against Australia. This article considers two of these threatened actions.

APR Energy PLC

APR Energy PLC ('APR') has threatened to bring a claim against the Commonwealth of Australia due to the operation of the Personal Property Securities Act 2009 (Cth) (the 'PPSA'). This piece of national legislation aims to provide protection of personal property interests by registration on the Personal Property Securities Register (PPSR). APR faces a number of obstacles should it forge ahead with its threatened action against Australia.

Background

In 2013, Horizon Power, a statutory body in Western Australia, retained Forge Group Power Pty Ltd ('Forge') to design and supply equipment in relation to a power station. In performance of this agreement, Forge leased four mobile gas turbine generator sets ('Turbines') from General Electric International Inc ('GE') for a fixed term.

Later in 2013, APR acquired the relevant part of GE's rental business. As part of this transaction, GE assigned the benefit of its lease of the Turbines to Power Rental Op Co Australia LLC ('OpCo'), a subsidiary of GE which became a subsidiary of APR during the acquisition. In early 2014, shortly after the Turbines had been installed at the power station in Western Australia, Forge went into administration and, approximately one month later, went into liquidation.

In 2015, Forge sought a declaration from the Supreme Court of New South Wales that, due to the operation of the PPSA, GE's interests in the Turbines vested in Forge immediately prior to it entering into administration. The court found in favour of Forge at first instance and held that, due to GE's failure to register its security interest in the lease of the Turbines on the PPSR, GE's (and now OpCo's) interest in the Turbines did vest in Forge immediately prior to it entering administration.

OpCo appealed this decision in the New South Wales Court of Appeal. On 6 February 2017, the Court of Appeal delivered its judgment, agreeing with the first instance decision that the security interest in the Turbines vested in Forge before it went into administration.

OpCo has one more chance to appeal this decision. It has applied for special leave to appeal to the High Court of Australia (Australia's highest court). The High Court may grant special leave to appeal if the proceedings involve a question of law or a matter of public importance. Other proceedings that may be granted special leave to appeal include where the High Court is required to resolve differences of opinion between different courts, or within one court, as to the state of the law and where the interests of justice require the consideration of the High Court.

If special leave to appeal is granted, APR or OpCo will then be able to proceed to have the substance of the appeal heard in the High Court of Australia. If APR is unsuccessful in the High Court, it will have exhausted its legal avenues in the Australian legal system.

Investor-state dispute settlement claim: prospects and hurdles

There is presently no investor-state dispute settlement (ISDS) mechanism in the Australia–United States Free Trade Agreement (AUSFTA). Various steps are available under the AUSFTA for APR or OpCo to possibly bring a claim against Australia, but these steps require considerable cooperation of both states (discussed below). Given the current political climate, the likelihood of the Australian and US governments agreeing to an ISDS process in the form of an investor-state arbitration is low.

Regardless of the lack of an ISDS mechanism in the AUSFTA, on 14 April 2017, APR filed a notice of arbitration against Australia pursuant to the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. APR is reportedly seeking to import the ISDS mechanism in the Australia–Hong Kong bilateral investment treaty (the same treaty relied on in the Philip Morris arbitration), the most-favoured nation clause in the AUSFTA. It also seeks to import the obligation of Australia to provide fair and equitable treatment in the Australia–Mexico bilateral investment treaty. The Australian Attorney-General's department has disputed that APR has a right to bring a claim against Australia and has said that APR 'cannot rely on other agreements in order to create jurisdiction'.

Even if APR surpasses the hurdle of gaining access to an investor-state arbitration procedure for it to bring an action against Australia, APR could face some difficulty in making out its claim. Expropriation would be difficult to establish because there was no supervening act of government that resulted in APR's loss of its security interest. Rather, GE simply failed to comply with local legislation at the time of the transaction.

An argument that APR has been deprived of a reasonably expected economic benefit would also be problematic because there has been no change in the state of affairs since the lease commenced, and therefore, APR should not have expected to retain its interest once Forge entered into administration because it had not registered its security interest in the Turbines on the PPSR. Establishing that APR was treated less favourably than a domestic investor would also be difficult because the PPSA applies equally to foreign and domestic security interest holders.

The progress of this case will be interesting to follow in both the domestic regime and international ISDS landscape given the current domestic political climate with respect to ISDS (discussed below).

NuCoal Resources Ltd

Another unresolved potential ISDS claim exists in relation to the New South Wales' Parliament's enactment of the Mining Amendment (Operations Jasper and Acacia) Act 2014 (NSW) (the 'Act'). This special legislation cancelled the mining exploration licence held by NuCoal Resources Ltd ('NuCoal') over certain tenements in the Doyle's Creek area of New South Wales, among others. This claim is problematic for the investors involved in terms of their prospects of recovering the value of their investment through an investment arbitration process. It is also concerning for Australia because it may impact on its reputation as a safe destination for foreign investment.

Background

NuCoal is an Australian Securities Exchange (ASX) listed company, in which approximately 30 per cent of the shareholding is owned by US investors. In 2010, it acquired its primary asset, Doyles Creek Mining Pty Ltd ('DCM') for $94m for the purpose of obtaining the exploration licence that had been granted to DCM more than a year earlier. In November 2011, the New South Wales Parliament referred allegations of misconduct and corruption relating to the circumstances surrounding the grant of the licence for investigation by the Independent Commission Against Corruption (ICAC). The ICAC delivered its report in August 2013, which included findings of corruption against former directors of DCM, and against the then New South Wales Minister for Primary Industries and Minister for Mineral Resources, in relation to the decision process culminating in the grant of the licence to DCM.

In January 2014, the New South Wales Parliament passed the Act, which cancelled DCM's licence, among others, on the basis of the information that came to light as a result of the ICAC investigation. The Act also provided that compensation is not payable by the state, and that the state is not liable for any conduct before the cancellation date in relation to the licence. In 2014, NuCoal

challenged the constitutional validity of the legislation in the High Court of Australia, and separately challenged ICAC's findings in the Supreme Court of New South Wales through administrative law judicial review. Both of these challenges were unsuccessful.

NuCoal has since made a submission, in April 2016, to the 2016 AUSFTA Review, in which it criticised several aspects of the conduct of New South Wales authorities in relation to this matter. It is highly critical of procedural aspects of the ICAC process, pointing out that it is not judicial in nature, and has alleged a lack of due process during the Acacia investigation, especially in relation to NuCoal's inability to participate, to any significant extent, in the ICAC process.

Furthermore, it attacked ICAC's conclusions that: (1) NuCoal was not a bona fide purchaser for value without notice; and (2) NuCoal knew of and contemplated the risk that its licence might be cancelled. Finally, NuCoal was also critical of the fact that, despite ICAC's conclusion that NuCoal was innocent of wrongdoing, the New South Wales Government did not provide any form of compensation to it, despite the ICAC's recommendation that the government should consider compensating any innocent parties if it enacted special legislation to cancel the licences. Unlike the Commonwealth, the state of New South Wales is not required to compensate 'on just terms' under its Constitution.

ISDS claim: prospects and hurdles

In its submission, NuCoal asserts a $100m claim against the Australian Government. It requests that the Australian Government and US Government enter into consultations, pursuant to Article 11.16 of the AUSFTA, with a view towards allowing US investors to bring a claim for compensation against the Australian Government in respect of the cancellation of the licences.

Article 11.16 of the AUSFTA, titled 'Consultations on Investor-State Dispute Settlement' provides:

> 'If a Party considers that there has been a change in circumstances affecting the settlement of disputes on matters within the scope of this Chapter and that, in light of such change, the Parties should consider allowing an investor of a Party to submit to arbitration with the other Party a claim regarding a matter within the scope of this Chapter, the Party may request consultations with the other Party on the subject, including the development of procedures that may be appropriate. On such a request, the Parties shall promptly enter into consultations with a view towards allowing such a claim and establishing such procedures'.

As noted by Luke Nottage in a recent article,[2] it has been reported that the investors arguing the above clause should be interpreted as requiring agreement on how to set up an ISDS procedure rather than whether it should be made available under AUSFTA. As Nottage has highlighted, this interpretation is problematic on its face due to the non-committal language of the provision, in particular that the parties should 'consider allowing' an investor to bring a claim. Following the conclusion of the May 2016 biennial AUSFTA Review, there was no specific mention on the Australian Department of Foreign Affairs and Trade website of changes to the current investment dispute provision in the AUSFTA, although the website does note that 'investment issues' were discussed during the review.

Policy and Australian public opinion on ISDS

The ISDS debate has polarised Australia since the negotiation of the AUSFTA, and has intensified since 2010 in the context of the Philip Morris claim related to Australia's tobacco plain packaging legislation and the negotiation of the Trans-Pacific Partnership (TPP). Over the last decade, there have been a number of parliamentary enquiries into investment arbitration. There have been changes of policy from anti-ISDS inclusion to inclusion on a case-by-case basis with successive changes of government. There have even been two anti-ISDS parliamentary bills: one aimed at preventing the executive from being able to agree to the ISDS in all subsequent treaties, and the other to introduce a requirement that both houses of Parliament approve all treaties prior to ratification. Both were rejected.

Most recently, the public appetite for ISDS has continued to decline, as evidenced by the comments in the public submissions to the enquiries into the TPP conducted by the Joint Standing Committee on Treaties and the Senate Foreign Affairs, Defence and Trade Committee (the 'Senate Committee'). Public concern was expressed in the submissions around:

- sovereignty and the ability to regulate in the public interest, such as for health and the environment, including in relation to the inclusion of intellectual property within the definition of a covered investment;
- the cost of defending claims, borne by the taxpayer;
- due process concerns about a perceived lack of transparency and the independence of arbitrators; and
- the lack of an appeals mechanism.

By the time the Senate Committee's report was delivered in February 2017, other factors had changed the conversation, especially the election of President Donald Trump and the US withdrawal from the TPP. The Senate Committee did not make any specific recommendations in relation to ISDS, though there were separate opinions annexed to the report that were highly critical of ISDS, in particular, the Dissenting Report of the Australian Greens party (political left), in line with their party position. The Senate Committee made two recommendations: (1) the Australian Government defers taking binding treaty action; and (2) it expedites widely supported reforms to the treaty-making process in order to assist the completion of future trade agreements.

Should investors be concerned?

As Nottage elaborates,[3] while the official reason for omitting ISDS from AUSFTA was that adequate domestic remedies existed that could be pursued in the domestic courts of the respective state, discussions have not specified how domestic laws may differ from customary international law or commonly used treaty standards. Such a discussion would be useful given, for example, the further development of Australian law on the meaning of 'acquisition' in the Australian Constitution in the High Court decision in *JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited and Ors v The Commonwealth of Australia* ('*JT International SA v Australia*').[4]

Nottage highlights that the decision in *JT International SA v Australia*, in which the constitutionality of the tobacco plain packaging legislation was challenged, indicates that Australian constitutional protection may be narrower than that provided in the Fifth Amendment to the US Constitution. The High Court held that an extinguishment of rights did not amount to an acquisition of rights because it did not confer a proprietary benefit or interest on the Commonwealth or any other person. As a result, the Commonwealth did not acquire any property and section 51(xxxi) of the Australian Constitution, which requires that an acquisition of property be on just terms, was not engaged.

Thus, something may amount to an indirect expropriation under the terms of a treaty without amounting to an 'acquisition' under Australian domestic law. As a result, there may be a disparity between rights enjoyed by domestic and foreign investors, with foreign investors having greater rights. However, where there is no ISDS mechanism provided in a treaty, as with AUSFTA, this will be cold comfort to a foreign investor. There is tension in this state of affairs, given that AUSFTA's investment chapter incorporates substantive rights largely based on the 2004 US Model Bilateral Investment Treaty (BIT), including an annex that largely restates US case law on indirect expropriation. US investors may wish to consider their corporate structure when investing in Australia. Investing in Australia directly from the US does not appear to provide a clear path to bringing a claim against Australia if it breaches its obligations under the AUSFTA. However, smart structuring could provide an investor with greater access to ISDS mechanisms where Australia has entered into BITs with other countries that do contain ISDS mechanisms.

Notes

1 The views set forth herein are the personal views of the authors and do not necessarily reflect those of the firms with which they are associated.
2 See, generally, Luke Nottage, 'Investor-State Arbitration Policy and Practice in Australia' (Sydney Law School Legal Studies Research Paper No 167, June 2016).
3 *Ibid.*
4 [2012] HCA 43.